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82-755
No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ALICE TOOMEY,
Respondent,

v.

JAMES MICHAEL TOOMEY,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Missouri

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QUESTION PRESENTED

Whether the decision of the Supreme Court of Missouri (two judges dissenting), which treats spouses who divorce and remarry each other and then divorce again as a class separate from spouses who divorce and marry new partners and then are divorced, and which requires spouses in the former class to pay larger maintenance awards upon their second dissolution of marriage than similarly circumstanced spouses in the latter class only because they are again divorcing their original spouse, invidiously discriminates against spouses in the former class in violation of their rights under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

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To the Supreme Court of Missouri

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Missouri entered on July 6, 1982.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of Missouri is reported at 636 S.W.2d 313 and is printed in Appendix A hereto, *infra*, p.p. A-1 to A-10. The opinion of the Missouri Court of Appeals for the Eastern District of Missouri is not reported and is printed in Appendix B hereto, *infra*, p.p. A-11 to A-16. The Decree of Dissolution of Marriage of the Circuit Court of St. Louis County, Missouri, is not reported and is printed in Appendix C hereto, *infra*, p.p. A-17 to A-20.

JURISDICTION

The judgment of the Supreme Court of Missouri was entered on July 6, 1982. Petitioner's Motion for Rehearing was duly and timely filed in said Supreme Court of Missouri. Said Motion for Rehearing was denied on August 2, 1982.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment XIV, Section 1. The said United States Constitution, Amendment XIV, Section 1 provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 452.335 R.S.Mo. 1978. The said Section 452.335 R.S.Mo. 1978 provides:

> "1. In a proceeding for nonretroactive invalidity, dissolution of marriage or legal separation, or a proceeding for maintenance following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse, the court may grant a maintenance order to either spouse, but only if it finds that the spouse seeking maintenance

(1) Lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs; and

(2) Is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

2. The maintenance order shall be in such amounts and for such periods of time as the court deems just, and after considering all relevant factors including:

(1) The financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;

(2) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;

(3) The standard of living established during the marriage;

(4) The duration of the marriage;

(5) The age, and the physical and emotional condition of the spouse seeking maintenance;

(6) The ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance; and

(7) The conduct of a party seeking maintenance during the marriage."

STATEMENT OF THE CASE

The judgment which gives rise to the within Petition dissolved a marriage between the parties that lasted less than three years. This was their second marriage to each other. Their first marriage was terminated by a decree entered by a Connecticut court in 1975. That first marriage of the parties had lasted over twenty years.

The parties were married for the second time on August 31, 1976. On November 16, 1977, Respondent herein (hereinafter "Mrs. Toomey") filed a petition in the Circuit Court of St. Louis County, Missouri to dissolve this second marriage. On July 27, 1979, the cause came on for hearing in the trial court.

At the time of the hearing, both of the parties were forty-nine years old. Petitioner herein (hereinafter "Dr. Toomey") was a licensed physician teaching at Washington University in St. Louis. Mrs. Toomey was employed part-time as a hostess in a restaurant. She had been a registered nurse, licensed in Connecticut, but she had not practiced for twenty-two years, and her license had expired. She testified that she had not been happy in the profession and that she did not intend to continue in that field. Four of the six children born during the first marriage of the parties were still minors at the time of the hearing.

Mrs. Toomey testified during the hearing regarding her income, her financial needs, and the relief she was seeking (including maintenance and child support). During her testimony, the following exchange took place among Mr. Cofman, then counsel for Mrs. Toomey, Mrs. Toomey, Mr. Seigel, counsel for Dr. Toomey, and the trial judge:

> "Q. (By Mr. Cofman) Is there anything unusual about your financial situation, presently, that you feel the Court should know about?

"A. Yes. I think that my husband feels that I am asking for too much. However, I have invested 25 years of my life in this marriage and the children and I —

"MR. SEIGEL: I am going to object your Honor. This is a three-year marriage.

"THE COURT: Sustained. Ma'am, your present marriage took place in 1976, is that correct?

"THE WITNESS: That's right.

"THE COURT: You are actually at this time, legally only married about three years.

"THE WITNESS: Legally, yes.

"Q. (By Mr. Cofman) Okay. There was a prior period of time which I have already stipulated that you had been married, which marriage was your first marriage?

"A. That's right, with the same man.

Q. And it was because of that first marriage that you gave up your career and went on —

MR. SEIGEL: I am going to object to what happened in the first marriage, your Honor.

"THE COURT: Sustained."

Following the hearing, the trial court entered a decree dissolving the marriage of the parties (Appendix C hereto, *infra*, p. A-17). Pursuant to said decree, Mrs. Toomey was awarded maintenance in the sum of $350 per month for a term of five years, which coincides with the youngest child of the parties reaching twenty-one. She was awarded custody of the minor children of the parties, and Dr. Toomey was ordered to pay child support for said children, including the cost of their private school and college educations. The parties were ordered to sell the family home within six months and divide the net proceeds equally. Dr. Toomey was awarded his pension plan.

Thereafter, Mrs. Toomey filed her appeal from said decree, challenging the child support order as well as the maintenance award and the property division. On June 16, 1981, the Missouri Court of Appeals rendered its opinion (Appendix B, *infra*, p. A-11) wherein it sustained Mrs. Toomey's attack on the child support order, and, because of the interdependent nature of the decree, remanded the case to the trial court to take additional evidence with respect to the nature and extent of marital property, maintenance and child support. In so doing, the appellate court, *sua sponte*, addressed the question of the duration of the subject marriage. The Court concluded as follows:

> "We are of the opinion that remarriage between the same parties after a divorce is a continuation of the marriage so that 'the duration of the marriage' as one of the elements in determining the amount of maintenance, § 452.355.1(4) R.S.Mo. 1978,[1] encompasses all of the time during which the parties were husband and wife."

Dr. Toomey timely sought a rehearing before the Court of Appeals and in his Suggestions to that Court he challenged the foregoing ruling on the ground, *inter alia*, that it unfairly and improperly distinguished between categories of ex-spouses without a legal or factual basis for making that distinction. After the Court of Appeals denied Dr. Toomey's Motion for Rehearing, he timely filed his Application to Transfer in the Supreme Court of Missouri, and that Court accepted said application in order to consider whether "the fact of a prior mar-

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[1] Although the Court cited § 452.355.1(4), the correct citation is § 452.335.1(4).

riage between the parties [is] a relevant factor for the trial court to consider in awarding maintenance."[2]

In his Supplemental Brief on Transfer Dr. Toomey again attacked the ruling of the Court of Appeals on the ground, *inter alia*, that it unfairly and improperly served to discriminate between domestic relations litigants who were otherwise similarly situated.

Over the dissent of two of its members, a majority of the Missouri Supreme Court, in its Opinion of July 6, 1982, (Appendix A, *infra*, p. A-1) held that evidence of a first marriage between the parties (such as the duration of the same) is relevant to determine the amount of maintenance to be awarded and the period of time over which it is to be paid upon a dissolution of their second marriage, and the Court ordered the case remanded to the trial court to take into consideration such factors.

Dr. Toomey timely filed his Motion for Rehearing in the Missouri Supreme Court, again raising the contention that said ruling unfairly discriminated against similarly situated domestic relations litigants, specifically citing the same as a violation of his right to equal protection under law as guaranteed by the United States and Missouri Constitutions, as amended. Said Motion for Rehearing was denied by the Supreme Court of Missouri on August 2, 1982.

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[2] The Supreme Court also reviewed the ruling of the Court of Appeals regarding the child support order. It reversed the decision of the appeals court on that issue, and upheld the trial court's child support order. Mrs. Toomey has not challenged that decision.

REASONS FOR GRANTING THE WRIT

The decision of the Supreme Court of Missouri in the instant case has been rendered in total disregard of the obvious injury it causes to Dr. Toomey's right to equal protection of the law as guaranteed to him by the Fourteenth Amendment to the Constitution of the United States. The Missouri court, by concluding that evidence of a first marriage between parties is relevant to deterine the amount and duration of maintenance to be awarded upon the dissolution of the second marriage between the same parties, has artificially created a spurious subclassification within the group of individuals who experience a second dissolution of marriage that is wholly unwarranted and unjustifiable and that unfairly and invidiously discriminates against those individuals who are placed within that fictitious subclass.

The Supreme Court of Missouri has concluded that a prior marriage between the same parties (and the duration of the same) is a relevant factor to consider in determining a maintenance award when those parties dissolve their second marriage. In reaching this conclusion, that Court has arbitrarily established two classifications of spouses who are seeking their second dissolution of marriage. The first class created by that Court is made up of those spouses who are dissolving their second marriage to each other. The second class created by that Court is made up of persons who have dissolved their first marriage, married a new partner, and are now dissolving that second marriage. In its decision, the Missouri court has decided that members of the former class shall be treated differently (and less favorably) than members of the latter class even though all are similarly circumstanced. This differentiation is without any rational basis, and therefore, it constitutes a violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

In determining a maintenance award, Missouri trial courts are guided by the provisions of § 452.335 R.S.Mo. 1978. That statute reads as follows:

"452.335. Maintenance order when jurisdiction lacked—finding required for

1. In a proceeding for nonretroactive invalidity, dissolution of marriage or legal separation, or a proceeding for maintenance following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse, the court may grant a maintenance order to either spouse, but only if it finds that the spouse seeking maintenance

(1) Lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs; and

(2) Is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

2. The maintenance order shall be in such amounts and for such periods of time as the court deems just, and after considering all relevant factors including:

(1) The financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;

(2) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;

(3) The standard of living established during the marriage;

(4) The duration of the marriage;

(5) The age, and the physical and emotional condition of the spouse seeking maintenance;

(6) The ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance; and

(7) The conduct of a party seeking maintenance during the marriage."

In its decision in the case at bar, the Missouri Supreme Court has now for all intents and purposes modified the fourth listed factor, "The duration of the marriage", to read "The duration of the marriage if the parties have not been previously married to each other, but the duration of the marriages if the parties have remarried each other." In so doing, the Court has distinguished between and classified into groups those spouses who are dissolving their second marriage. The Missouri court has placed into one group those spouses who are dissolving their second marriage to each other. The Court has placed into the other group those spouses who are dissolving a second marriage, such second marriage being with a new partner. It is this designation of the first group as an artificial subclassification among the class of all people who experience a dissolution of a second marriage which clearly deprives Dr. Toomey and others like him of equal protection under the law.

This Court has consistently held that a classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Eisenstadt* v. *Baird,* 405 U.S. 438, 447, 31

L.Ed.2d 349, 359 (1972), quoting from *Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415, 64 L.Ed. 989, 990 (1920). "The Equal Protection Clause 'imposes a requirement of some rationality in the nature of the class singled out.' " *James* v. *Strange,* 407 U.S. 128, 140, 32 L.Ed.2d 600, 610 (1972), quoting from *Rinaldi* v. *Yeager,* 384 U.S. 305, 308-309, 16 L.Ed.2d 577, 580 (1966). And as was stated by this Court in *Yick Wo* v. *Hopkins,* 118 U.S. 356, 373-374, 30 L.Ed. 220, 227 (1885):

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

Section 452.335 R.S.Mo. 1978 is neutral on its face. It makes no distinction between those spouses who remarry each other and those spouses who enter a second marriage with a new partner. However, in the instant case, the Supreme Court of Missouri has placed an interpretation upon said statute which, by judicial fiat, imposes just that artificial distinction between those purported groups. The Court then goes one step further, and having made said distinction, treats the members of the former group differently, and less favorably, than the members of the latter group. Thus, even though § 452.335 does not distinguish between any domestic relations litigants, as applied by the Supreme Court of Missouri in the instant case, that statute now discriminates between groups of spouses who are getting a second divorce. As this Court held in *Yick Wo* v. *Hopkins, supra,* this kind of unequal application of the law falls squarely within the prohibition of the Equal Protection Clause.

On its face, § 452.335.1(1) advises that the purpose of a maintenance award granted thereunder is to provide for the "reasonable needs" of the recipient spouse who lacks sufficient property and appropriate employment to provide for such needs. The Supreme Court of Missouri has declared that the "primary purpose" of maintenance "is to provide subsistence for the spouse." *Dyche* v. *Dyche,* 570 S.W.2d 293, 296 (Mo. en banc 1978). And it has been held that the statute evinces "a legislative intent to remove any punitive quality as to the party providing maintenance . . . There is a new emphasis on the self-sufficiency of both parties following the dissolution." *Brueggemann* v. *Brueggemann,* 551 S.W.2d 853, 856-857 (Mo.App. 1979).

In light of the purpose of § 452.335, it is impossible to perceive any ground or reason having a "fair and substantial relation to the object" of § 452.335 that justifies the Missouri Supreme Court's designation of a separate classification for those persons seeking to dissolve a second marriage with their original spouse as distinct from those persons seeking to dissolve a second marriage with a second spouse.

The purpose of § 452.335 is to assure that "the reasonable needs" of a spouse receiving maintenance will be met. In the case of a man and woman who are about to dissolve the second marriage for both of them, the "reasonable needs" of the spouse who receives maintenance upon such dissolution will arise independently from the fact that he/she is divorcing his/her original spouse rather than a second spouse. By way of illustration, if A marries B, subsequently divorces B, later re-marries B, and then dissolves that second marriage, while at the same time, C marries D, later divorces D, thereafter marries E, and then dissolves that marriage, and if all of the other factors contemplated by § 452.335 are equal (i.e., the duration of the second marriages is the same, the parties are similarly

employed, the parties are the same age and in the same state of health, the parties have the same number of children, and the parties have the same income and property), there is no justification, in light of the purpose of the statute or otherwise, for treating A's request for maintenance any differently than C's request. Accordingly, there is also no justification for considering B's obligation to pay maintenance as being any different than E's obligation. Yet under the terms of the opinion under question, the mere fact that A is again divorcing his/her original spouse is sufficient to upset the balance between A and C and entitle A to a different (and more lucrative) award than C, i.e., A receives some maintenance, more maintenance, or maintenance for a longer period, while C receives no maintenance, less maintenance, or maintenance for a shorter period. That result does not arise out of a difference in the reasonable needs of A and C. It comes about *only* because A remarried B while C chose E as a second spouse. Clearly, that difference bears absolutely no relationship, substantial or otherwise, to the purpose of § 452.335. Accordingly, to treat B differently than E, even though the actual financial needs of A and C are the same, amounts to placing B in an arbitrary, unfair and unreasonable classification, separate and distinct from others similarly circumstanced, i.e., all individuals who are dissolving a second marriage, without any basis in rationality.

The foregoing illustration also demonstrates that the decision of the Missouri Court not only discriminates *against* spouses who must *pay* maintenance following the dissolution of their second marriage to their original spouse, but it also discriminates in *favor* of spouses who *receive* maintenance following the dissolution of their second marriage to their original spouse. Thus, in terms of the illustration, all other factors being equal, C will always receive less maintenance than A even though their actual financial needs are the same. This discrimination against C is no more permissible than the discrimination suffered by B.

The foregoing vividly demonstrates the uneven and capricious application of §452.335 that arises out of the decision of the Supreme Court of Missouri herein. As a result of that opinion, persons like Dr. Toomey who remarry their former spouse and thereafter go through a dissolution of that second marriage will henceforth be regarded as having been a party to a much longer marriage than persons who end their original marriage, marry another person and thereafter dissolve that second marriage. Although the only difference between the two groups is in the identities of the parties to the respective marriages (a difference that bears no relationship to the purpose of §452.335), spouses in the former group, like Dr. Toomey, will be ordered to pay more maintenance for longer periods of time than spouses in the latter group.[3]

As demonstrated by the foregoing, the decision of the Supreme Court of Missouri distinguishes between those spouses who divorce and remarry each other, and then divorce again, and those spouses who divorce and marry another person, and

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[3] See, *Elliott* v. *Elliott*, 621 S.W.2d 305 (Mo. App. 1981). In that case a man and woman, each of whom had been previously married to another person, were married for four years. Husband was an attorney, wife did not work. Each brought their own property and children to the marriage. On these facts, notably similar to the circumstances in the case at bar except for the identities of the prior spouses, the trial court declined to award the wife continuing maintenance "such as might be justified by a *long* marriage." *Id.* at p.308. (Emphasis supplied) The Missouri Court of Appeals approved the trial court's reasoning and application of the law, and the Supreme Court of Missouri declined to review the decision. In light of the decision in *Elliott*, it is clear that if Mrs. Toomey had married another man instead of remarrying Dr. Toomey, the courts of Missouri would have regarded her second marriage as one of short duration, and any maintenance award arising therefrom would have been calculated accordingly.

then dissolve their second marriage. After making that distinction, the opinion discriminates against the spouses in the former group by calling upon them to pay more maintenance for a longer period of time than their counterparts in the latter group. The sole reason for this difference bears no relationship to the needs of the spouse who will receive the larger maintenance payments; it rests exclusively on the identity of the spouse who will make those payments. Inasmuch as the distinction made between the groups bears no relationship, reasonable or otherwise, to the statutory purpose for awarding maintenance payments, the discrimination resulting therefrom is an invidious and impermissible one that is prohibited under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari be granted.

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